81-121

No.

IN THE

Supreme Court of the United States

OCTOBER TERM 1980

Office-Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS,
CLERK

AMOS REED, et. al.,
Petitioners

v.

JAMES R. GRISSOM,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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QUESTIONS PRESENTED

I. WHETHER A CONSTITUTIONAL CLAIM OF DELIBERATE INDIFFERENCE TO A SERIOUS MEDICAL NEED IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS CAN BE DERIVED FROM A HARMLESS TECHNICAL VIOLATION OF STATE STATUTORY LAW?

II. WHETHER A FEDERAL APPELLATE COURT'S DETERMINATION OF QUESTIONS OF STATE LAW WITHOUT BENEFIT OF ANY LEGAL ARGUMENTS IN THE DISTRICT COURT AND WITHOUT REFERENCE TO ANY STATE COURT AUTHORITIES VIOLATES ESTABLISHED PRINCIPLES OF EQUITY, COMITY, AND FEDERALISM?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the United States Court of Appeals for the Fourth Circuit, whose judgements are sought to be reversed, are James R. Grissom, an inmate in custody in the North Carolina Department of Corrections; Amos E. Reed, Former Secretary of the North Carolina Department of Correction; Fletcher K. Sanders, Administrator for the Odom-Caledonia Complex of the North Carolina Division of Prisons; L.V. Stephenson, Superintendent of Caledonia Prison of the North Carolina Division of Prisons; George Boone, Assistant Superintendent of Caledonia Prison of the North Carolina Division of Prisons; and E.L. Panepento, Physicians Assistant at Caledonia Prison of the North Carolina Division of Prisons.

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v.

JAMES R. GRISSOM,
Respondent

Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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TO: THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioners, Amos E. Reed, Former Secretary of the North Carolina Department of Correction; Fletcher K. Sanders, Administrator for the Odom-Caledonia Complex of the North Carolina Division of Prisons; L.V. Stephenson, Superintendent of Caledonia Prison of the North Carolina Division of Prisons; George Boone, Assistant Superintendent of Caledonia Prison of the North Carolina Division of Prisons; and E.L. Panepento, Physicians Assistant at Caledonia Prison, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit filed October 23, 1980, and Order denying the Petition for Rehearing filed April 21, 1981.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Fourth Circuit filed October 23, 1980 and April 21, 1981 are unpublished and are printed in the Appendix to the petition. [A pp A-7 through A-9; A-19 through A-21]

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Eighth and Fourteenth Amendments to the Constitution of the United States.

STATEMENT OF CASE AND FACTS

This is a civil rights action brought by Plaintiff James Grissom, *pro se* in the Eastern District of North Carolina. In a Complaint filed September 24, 1979, Grissom,a state prisoner housed at Caledonia Correctional Institution at Tillery, North Carolina, alleged that he had been forced to work despite an arm injury and ill health.[1] Those named as Defendants include Amos E. Reed, then Secretary of the Department of Correction, and three custodial officials who are in charge of the operation of Caledonia Prison. Also named was Physician Assistant E. L. Panepento. Grissom sought an order requiring that he be removed from his prison job. He also sought compensatory and punitive damages.

Plaintiff's specific claim was that Panepento, the Physician Assistant, changed his health grade from "B" to "A" without properly examining him. Under departmental regulations, inmates in A grade health were deemed capable of performing normal work assignments.[2] Grissom contended that Panepento's decision to change his health grade compelled him to take a job lifting boxes and placing

[1]The Plaintiff also complained that he had been denied adequate access to the Courts. The District Court dismissed this claim and the Court of Appeals affirmed so that this claim is not before this Court.

[2]Departmental regulations effective at the date of Panepento's action defined "health grades" as follows:

> Health grade A indicates that there is no physical condition which would preclude a normal work assignment. Health grade B indicates that there is a physical condition which places certain limits on his work assignments...Health grade C indicates that the inmate has a health condition so serious that it precludes giving him a work assignment. 5 NCAC 2E.0202(a) (8).

vegetables on a conveyor belt in the cannery at the prison. He complained that the job aggravated his arm injury and emphysema.

Defendants responded to Plaintiff's claim with Motions to Dismiss and for Summary Judgment supported by affidavits and medical records. The records establish that on June 25, 1979, Panpento did examine Plaintiff and found Plaintiff had "good range of motion. . . perhaps very moderately decreased." Panepento then concluded in the record, "I see no indication for special consideration in his work assignment." The records submitted also showed that Plaintiff did not have emphysema although he did have frequent colds and had been advised by Panepento to quit smoking. It is undisputed that Grissom did not work until June 27, 1979, two days after Panepento examined him. Panepento's affidavit further indicated that all of his work was reviewed by one of two supervisory physicians.

Grissom submitted a response to the Motion for Summary Judgment in which he contended,

> "James Grissom has not been afforded any physical examination, any examination which would be complete would have to consist of X-rays, blood tests and such which Panepento is not capable of performing." [sic]

Grissom also charged that Panepento was "impersonating a doctor" and claimed that he was "racist without ability, knowledge of the needs of inmates at Caledonia Prison and was lacking in medical training . . . therefore arising deliberate indifference toward inmates." [sic]

On February 11, 1980, the District Court issued an order granting the Defendants' Motion for Summary Judgment on Plaintiff's claim. [A pp A-3 through A-6] The court referred to the record showing that Plaintiff had no immobility in his arm or breathing difficulties and concluded that Plaintiff had failed to state any facts that might show deliberate indifference to a serious medical need. Although the Court found that Panepento was not a licensed

"physician," it reached the following conclusion:

> While prisoners have a constitutional right to medical care, they have no right to have a licensed physician stationed 24 hours a day at the medical unit. The hiring of various medical support staff such as nurses and physicians assistants, whose work, as in this case, is supplemented by licensed physicians on a periodic basis, violates no constitutional right of the Plaintiff. [A p A-4]

On appeal the United States Court of Appeals for the Fourth Circuit reversed the District Court ruling. Although the Court acknowledged that Panepento had examined the Plaintiff, it observed that N.C.G.S. 148-19(c) requires that prisoners be examined by a "competent physician" prior to being assigned to work.[3] The Court then concluded that Panepento was "not legally qualified to conduct the [physical] exam and make the health grade determination called for by North Carolina law. [A p A-9] The Court went on to hold that supervisory officials had violated North Carolina law by allowing the examination to occur and the case was to be remanded to determine whether the violation of law was an arbitrary one causing Grissom to suffer cruel and unusual punishment. [A p A-8] Neither side had presented any authority during the proceedings in the lower court which might support the conclusion that Panepento was legally unqualified to perform the physical examination on Grissom.

State officials then petitioned for rehearing noting that the Court of Appeals had failed to consider N.C.G.S. 90-18.1. Under this statute, physician assistants must apply for and receive the approval of the Board of Medical Examiners before they are legally authorized to perform certain medical

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[3]The full text of N.C.G.S. § 148-19(c) reads as follows:

> (c) Each prisioner committed to the State Department of Correction shall receive a physical and mental examination by a competent physician as soon as practicable after admission and before being assigned to work. The prisoner's work and other assignments shall be made with due regard for the report of the physican as to the prisoner's physical and mental condition.

acts. The Board's application form required that the applicant specify the acts that he intended to perform prior to its approval of the application. Panepento specified that he intended to perform physical examinations for diagnostic purposes, and his application was approved by the Board. Therefore, the state officials contended that Panpento was qualified to examine Grissom. They also argued that even if Panepento were negligent or technically unqualified to perform the examination under state law, there was no indication that anyone acted with deliberate indifference to a serious medical need.

The Court of Appeals then issued another order which acknowledged that physician assistants such as Panepento could perform physical examinations for diagnostic purposes on persons other than prisoners. Nevertheless, the Court repeated its conclusion that G.S. 148-19(c) explicitly mandated that "prisoners" enjoy the unique privilege of being examined by physicians. [A p A-20] The Court then ordered the case remanded with instructions to the lower court to

> "consider whether the alleged injuries resulted from arbitrary disregard of the statutory requirement that a physician perform the examination, whether any injury actually resulted from an improper medical examination, whether the results of the examination were deliberately overlooked, whether an examination by a competent physician would have prevented the alleged injury, and whether the alleged harm was of a constitutional magnitude."

This Petition for Certiorari followed.

INTRODUCTORY STATEMENT

Before beginning our argument, we wish to explain the scope of the Court of Appeals decision and the reasons that we believe that it is erroneous and very harmful to the interests of the State. The decision does not implicate physician assistant Panepento. It is undisputed that

Panepento did examine the Plaintiff prior to allowing him to work. If he acted improperly, which is denied, he would have committed no more than an error in judgment, which does not provide the basis for a cognizable claim under the Eighth and Fourteenth Amendments. The Court of Appeals does not question Panepento's conduct. Instead, it opens a whole new inquiry into the motives of other Defendants in allowing Panepento to conduct the examination. The Court held that even though Panepento could legally perform an examination on anyone but a prisoner, he was not legally qualified to examine prisoners and that other Defendants may have arbitrarily allowed him to do so in violation of state law. The Court concluded that such a violation of state law could have caused Plaintiff to suffer cruel and unusual punishment. Notwithstanding the Court of Appeals' conclusion, there was no evidence of any arbitrary action by state officials in the Court below.

More important, the argument submitted by state officials in the Petition for Rehearing makes it clear that if a violation occurred, the violation was a technical one. It is undisputed that a physician assistant can examine anyone other than a prisoner. At most, N.C.G.S. 148-19(c) represents a technical requirement that "prisoners" be examined by a competent physician. The existence of such a technical requirement in no way implies that a qualified physician assistant is not capable of performing physical examinations. Yet the Court of Appeals held that a person who *allows* a physician assistant to perform the function may be guilty of deliberate indifference to a serious medical need. The decision sets ESTELLE v. GAMBLE on its head.

The Court of Appeals opinion came years after statutes establishing a Physicians Assistant Program were passed. Following the enactment of these statutes, the North Carolina Department set up a system in which physician assistants and nurse practitioners were employed on a

fulltime basis at nine of North Carolina largest prisons.[4] Each of these physician assistants have received training in medical school programs and have performed physical examinations and continue to perform these examinations in accordance with N.C.G.S. 90-18.1 and the regulations of the State Board of Medical Examiners. *It is obvious that state officials have allowed physician assistants to perform these examinations because state law (N.C.G.S. 90-18.1) and the regulations of the Board of Medical Examiners allow it.* The Eighth Amendment is not violated absent some showing that a Defendant has acted with deliberate indifference to a serious medical need. Even if state officials' decision to allow Panepento to perform a physical examination on Grissom was a technical violation of state law, there is no evidence of a constitutional violation here. There has been no showing that any Defendant has acted with deliberate indifference to a serious medical need.

The Court of Appeals' decision in this case will mean that each physical examination performed by a physician assistant will be subject to strict judicial scrutiny. State officials will have to prove that they did not "arbitrarily" violate state law whenever a prisoner complains that he has been improperly

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[4]The nine physician assistants and nurse practioners working for the Department of Correction are listed below. The table also shows where each of these employees work and how long they have worked.

Name	Place of Employment	Date of Initial employment
Vernon D. Bernhardt	Piedmont Correctional Center	7/16/79
Nathaniel Cameron	Central Prison	8/1/76
Earl V. Echard	Wayne Correctional Center	5/1/79
Lois B. Macdonald	North Carolina Correctional Center for Women	11/19/73
Buford B. McConatha	Central Prison	10/24/77
Edward L. Panepento	Caledonia	8/1/78
Phyllis D. Prewitt	Western Correctional Center	5/15/79
Leon Sharpe	McCain Correctional Center	9/12/78
James O. Vaughn, Jr.	Polk Youth Center	5/1/76

examined by a physician assistant. The Court of Appeals imposes this enormous burden on the State in spite of the fact that there is absolutely no evidence of intentional wrongdoing or deliberate indifference in this case. We believe that the Court of Appeals' action was inappropriate and we urge this Court to grant the Petition for Certiorari and to *summarily reverse* the decision of the Court of Appeals for the reasons stated in detail below.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS ERRED WHEN IT HELD THAT A TECHNICAL VIOLATION OF STATE LAW WAS OF ITSELF SUFFICIENT EVIDENCE OF DELIBERATE INDIFFERENCE TO A SERIOUS MEDICAL NEED TO WITHSTAND THE DEFENDANTS' MOTION TO DISMISS. (RULE 12(b) (6))

In our introductory statement, we summarized our reasons for arguing that if any state official violated state law, the violation would obviously be a technical one. Before addressing the constitutional issue directly, we wish to fully explain this contention. N.C.G.S. § 90-18(13) establishes that certain acts performed by an assistant to a licensed physician do not constitute the unauthorized practice of medicine. Physician assistants may perform these acts when

a. such assistant is approved by and annually registered with the Board as one qualified by training or experience to function as an assistant to a physician, except that no more than two assistants may be currently registered for any physician, and
b. Such act, task or function is performed at the direction or under the supervision of such physician, in accordance with the rules and regulations promulgated by the Board, and
c. The services of the assistant are limited to assisting the physician in the particular field or fields for which the assistant has been trained, approved and registered.

Provided that this subdivision shall not limit or prevent any physician from delegating to a qualified person any acts, tasks or functions which are otherwise permitted by law or established by custom.

N.C.G.S. § 90-18.1(d) reads as follows:

Physician assistants are authorized to order medications, tests and treatments in hospitals clinics, nursing homes and other health facilities under the following conditions:

(1) The Board of Examiners has adopted regulations governing the approval of individual physician assistants to order medications, tests and treatments with such limitations as the Board may determine to be in the best interest of patient health and safety;
(2) The physician assistant has current approval from the Board;
(3) The supervising physician has provided to the physician assistant written instructions about ordering medications, tests and treatment, and when appropriate specific or oral written instructions for an individual patient, with provision for review by the physician of the order within a reasonable time, as determined by the Board, after the medication, tests or treatment is ordered; and
(4) The hospital and the health facility has adopted a written policy, approved by the medical staff after consultation with the nursing administration, about ordering medications, tests and treatment, including procedures for verification of the physician assistants' orders by nurses and other facility employees and such other procedures as are in the interest of patient health and safety.

In implementing this statute, the Board has established special requirements for those physician assistants who function at any site other than a physician's office, a hospital, or emergency department, or an extended care facility. In such cases, the Board's application form requires a listing of "functions which the physician assistant will frequently carry out at this site." Because Panepento functions at a facility that does not come within any of the listed exceptions, he responded to this request. Panepento's application list several "standing orders" issued to him by his supervising physicians at the health care facility within the Caledonia Odom Complex. One of these "standing orders" gives Panepento authority

> to perform the necessary physicial exams and histories, routine and diagnostic.

The approval of his applicaiton by the North Carolina Board of Medical Examiners in accordance with North Carolina law gave Panepento the legal authority to perform a physical examination and make a routine diagnosis in this case.[5] After the defendants had had a chance to bring these statutes before the Court of Appeals, the Court apparently agreed that a physician assistant is legally qualified to perform a physicial examination on a patient. In denying the Petition for Rehearing, however, the Court concluded that the language of N.C.G.S. 90-18.1 does not "countermand the specific mandate of N.C.G.S. 148-19(c), which addresses the medical needs of prisoners directly." The Court held that because of this statute, "Grissom is entitled to prove if he can, that his injury resulted from the deliberate indifference or arbitrary action of the Defendants." Presumably the Defendants' action would be arbitrary if they knew or should have known that Panepento was unqualified to perform a physical examination. Yet it is undisputed that Panepento is legally qualified to perform a physical examination on any person in North Carolina that is not a prisoner. His

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[5]A copy of Panepento's application and the Board's letter of approval are attached. [Ap A-10]. This matter was also submitted to the Court of Appeals on the Petition for Rehearing.

qualifications were scrutinized by the State Board of Medical Examiners and the Board deemed him capable of performing the examination. The Defendants contend that they are entitled to rely on the decision of the State Board of Medical Examiners and that further inquiry by the federal judiciary is unwarranted.

This Court has held in a variety of contexts that a violation of state statutes or rules and regulations of itself would not state a constitutional claim. See BISHOP v. WOOD, 426 U.S. 341, 349 n. 13 (1976); PAUL v. DAVIS, 429 U.S. 693, 698-700 (1976). Moreover, it is clear that in order to state a constitutional claim under the Eighth Amendment, the plaintiff must allege deliberate indifference to a serious medical need. ESTELLE v. GAMBLE, 429 U.S. 97 (1976). In this case Panepento offered medical records that showed that he examined the plaintiff before allowing him to work. This should have ended the matter. ESTELLE v. GAMBLE, supra. The Court of Appeals *sua sponte* opened up the inquiry into Panepento's qualifications and the defendants established Panepento's qualifications in the Petition for Rehearing. Based on N.C.G.S.§148-19(c), the Court of Appeals, however, insisted that Panepento might not be qualified to examine prisoners even though he could examine other persons. At most, the Court found a technical violation of state statutory law. There was no evidence that anyone acted arbitrarily; therefore, the Court of Apeals should not have intervened.

II. THE COURT OF APPEALS VIOLATED ESTABLISHED PRINCIPLES OF EQUITY, COMITY AND FEDERALISM IN MAKING A DETERMINATION OF AN IMPORTANT QUESTION OF STATE LAW WITHOUT BENEFIT OF ANY LEGAL ARGUMENT IN THE DISTRICT COURT AND WITHOUT CITING ANY STATE AUTHORITIES.

The Court of Appeal's original decision in this case was released without benefit of any legal argument on the state law question in the District Court and without reference to N.C.G.S. § 90-18(13) and N.C.G.S. § 90-18.1. These statutes establishing the physician assistant's program were enacted long after the adoption of § 148-19(c), the statute upon which

the Court relied. The Petition for rehearing brought forward the more recent statutes for the Court's review. The Court implicitly recognized that a physician assistant could be legally qualified to perform a physical examination on any person other than a prisoner but went on to hold that allowing the physician assistant to examine a prisoner may be "arbitrary" and in violation of the Eighth Amendment. The appeals court so held even though it was shown to them that Panepento was a licensed physicians assistant. There can be no reason for such a holding other than distrust of state officials, including the defendants. Such inherent distrust of state officials is an inappropriate reason for intervention in state affairs. ALLEN v. McCURRY, _____ U.S. _____, _____ 101 S.Ct. 411, 420, 66 L.Ed.2d 308, 320 (1980) and cases cited therein. This Court has emphasized time and time again that

> [t]he entire country is made up of a union of separate state governments, [and] ... the national government will fare best if the states and their institutions are left free to perform their separate functions in their separate ways. JUIDICE v. VAIL, 430 U.S. 327, 334 (1977) quoting YOUNGER v. HARRIS, 401 U.S. 37, 44 (1971) and HUFFMAN v. PURSUE LIMITED, 420 U.S. 592, 601 (1976).

Plaintiff has made no showing that state officials have failed to perform their function adequately. Absent some showing of bad faith or deliberate indifference, interference with state affairs cannot be justified.

CONCLUSION

This Court very recently warned that federal courts should not become enmeshed in the "minutia" of prison operations. The Court observed that

> [u]nder the Constitution, the first question to be answered is not whose plan is best, but in what branch of the government is lodged the authority to initially devise the plan. This does not mean that constitutional rights are not to be scrupulously observed. It does mean however, that *the inquiry*

> *of federal courts to prison management must be limited to the issue of whether a particular system violates any prohibition of the Constitution* . . . BELL v. WOLFISH, 441 U.S. 520 at 562.

In this case, the Court of Appeals apparently seeks to probe the methods used by the State Board of Medical Examiners to determine whether physician assistants are as qualified to conduct physical examinations of prisoners as they are to conduct examinations on free citizens. The Court took this action in spite of the fact that there was no evidence that a constitutional right has been violated. The Court of Appeal's action requires that state officials prove lack of "arbitrariness" in this case and every case in which a prisoner claims that he has been improperly examined by a physicians assistant. This Court can relieve state officials of this burden by granting this Petition for Certiorari and summarily reversing the Court of Appeals on authority of ESTELLE v. GAMBLE, 429 U.S. 97 (1976). We urge the Court to take this action.

This the 20th day of July, 1981

Respectfully submitted,

RUFUS L. EDMISTEN
Attorney General

Ben G. Irons, II
Assistant Attorney General

ATTORNEYS FOR PETITIONER

CERTIFICATE OF SERVICE

This is to certify that three (3) true and correct copies of the foregoing Petition for Certiorari has been served upon the following by depositing three (3) copies of the same in the United States Mail, postage prepaid, addressed to:

James R. Grissom
P.O. Box 423
Williamston, North Carolina 27892

This the 20th day of July, 1981.

RUFUS L. EDMISTEN
Attorney General

_____

Ben G. Irons, II
Assistant Attorney General

APPENDIX

APPENDIX

1. Pro Se Complaint A-1
2. Opinion of the District Court A-3
3. Opinion of the Court of Appeals A-7
4. State Board of Medical Examiners A-10
5. Opinion of Court of Appeals on Rehearing A-30

FORM TO BE USED BY A PRISONER IN FILING A COMPLAINT UNDER THE CIVIL RIGHTS ACT, 42 U.S.C. SEC. 1033

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

No. 79-542 - CRT

JAMES R. GRISSOM Prison Number 11232-274

AMOS REED: Secretary of Department of Corrections
FLUICHER K. SANDERS: Area Administrator; P.L. Panepento Medical Asst.
L.V. STEPHENSON; Supt.; GEORGE D. BOUND, Assist. Supt.

I. HAVE YOU BEGUN OTHER LAWSUITS IN FEDERAL COURT DEALING WITH THE SAME FACTS INVOLVED IN THIS ACTION?
yes (XX) no ( )

IF YOUR ANSWER IS YES, DESCRIBE THE FORMER LAWSUIT IN THE SPACE PROVIDED BELOW: Have filed Civil Action No. 79-0294 concerning Classification. And have filed Case No. 79-101 CRT, now pending, concerning illegal lock-up and Denial of due process during Disciplinary proceeding.

II. PLACE OF PRESENT CONFINEMENT Caledonia Correctional Institute
P.O. Box 137 Tillery, N.C. 27887

A. Name of Plaintiff, James R. Grissom; Address, P.O. Box 137, Tillery, N.C. 27887.
B Defendant AMOS REED is employed as a Secretary of Correction at Raleigh, North Carolina.
C Additional Defendants FLETCHER K. SANDERS, Area Administrator L.V. STEPHENSON, Supt, GEORGE D. BOONE, Assist. Supt. E.L. PANEPENTO, Medical Asst.

IV. STATEMENT OF CLAIM

My health Grade was changed from B to A Grade without first giving me a complete physical examination, forcing me to work with a paralized Arm, and suffer from Emphysema. In so denying him serious Medical needs, and Denial of access to Law Library. That after 8 years Plaintiff's health grade was changed from B to A. That the changing was a means of reprisals because Plaintiff assisted another inmate with Legal Work. Plaintiff does not claim to be a Jail House Lawyer, but has been labeled with the Name by Prison Officials. And that is why the Plaintiff's health Grade was changed from B to A as punishment.

V. RELIEF SOUGHT BY PRISONER

Requires Defendants ET. al. to refrain from any further or future Cruel and Unusual Punishment or to admitting any adverse, erroneous or fictitious reports or prescriptions into his records to conceal their unlawful acts. And Order the Prison Officials not to retaliatate against Plaintiff for this Action. Compensatory Damages in the Amount of $25,000 from each Defendant. Trial by Jury, Plaintiff's cost of this Action and any further Relief as this Court may deem just and proper.

/S/ James R. Grissom

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

JAMES R. GRISSOM,
Plaintiff

VS.

AMOS REED, et al.,
Defendants

NO. 79-542-CRT
ORDER

Plaintiff James R. Grissom, a North Carolina state court prisoner, brings this action pursuant to 42 U.S.C. § 1983 alleging deliberate indifference by various prison officials to his serious medical needs and denial of the use of the law library. The defendants have moved for summary judgment.

Grissom's medical claim is premised upon his allegation that he was assigned to the work detail at the prison's cannery even though he has paralysis in his right arm, emphysema, and various other ailments. The defendants have countered the allegations with various records of prison medical personnel and supervisory officials indicating that Grissom suffers no immobility in his arm or breathing difficulties and that in any event he still would be able to perform the work duties assigned to him should he suffer from the alleged infirmities. Grissom's work assignment consists of loading vegetables on a conveyor belt and then sitting on a stool in front of the conveyor belt and preparing the vegetables so that they will be suitable for canning. Grissom does not state that he is not able to perform the work with the required sufficiency or that the work is causing his health to deteriorate to a significant degree. Accordingly, he has at best alleged negligent behavior by the defendants, which is not cognizable under Section 1983, and in no event has he presented sufficient facts indicating a deliberate indifference to his medical needs.

Grissom further claims a violation of his rights by the prison officials' hiring of the defendant Panepento, who is not

licensed to practice medicine, as a physician's assistant. While prisoners have a constitutional right to medical care, they have no right to have a licensed physician stationed twenty-four hours a day at the medical unit. The hiring of various medical support staff such as nurses and physician's assistants, whose work, as in this case, is supplemented by licensed physicians on a periodic basis, violates no constitutional right of the plaintiff.

Grissom's second claim is that he is denied access to the courts through limited use of the law library. The defendants recount in their affidavits the long history of library use by Grissom and fully admit to an isolated incident in which a delay in the processing of a request by Grissom to use the library resulted in an authorization to use the library on a particular date, when the date had already passed upon receipt by Grissom of the authorization. The court concludes that this isolated instance alone does not amount to a denial of Grissom's right of access to the courts. However, Grissom goes on to allege in his counteraffidavits that one Officer Durham, a non-defendant who is in charge of the prison's law library, refused to provide Grissom with sufficient copies of a complaint to serve upon all the named defendants within a particular lawsuit and that Durham told Grissom to leave the law library area and to never come back. Grissom alleges that supervisory personnel "should know" of Durham's actions and therefore are liable.

Grissom's mere allegation that the supervisory prison officials should have known of Durham's alleged wrongdoing does not state a claim cognizable under Section 1983 against the defendants. Prison supervisory officials are not *per se* liable for the acts of their subordinates under the doctrine of *respondeat superior* in Section 1983 suits. *Vinnedge* v. *Gibbs*, 550 F.2d 926 (4th Cir. 1977). While a higher official may be liable for the acts of his subordinates if he actually participates or knowingly acquiesces in the alleged violation, *Harris* v. *Chanclor*, 537 F.2d 203 (5th Cir. 1976), or if the higher official is guilty of gross negligence, *Jenkins* v. *Averett*, 424 F.2d 1228 (4th Cir. 1970), mere negligence by the supervisory personnel is not sufficient to state a cause of action. *Street* v. *Surdyka*, 492 F.2d 368 (4th Cir. 1974).

In so holding, the court has considered troublesome contrary language in *Davis v. Zahradnick*, 600 F.2d 458 (4th Cir., June 29, 1979). In *Davis*, the prisoner alleged that prison guards idly watched as another prisoner assaulted the plaintiff with a knife and that the prison warden was liable to him under Section 1983 because he "failed to control the subordinates." The defendants moved for summary judgment and the district court granted the motion. The Fourth Circuit reversed in a *per curiam* opinion on the basis that the district court did not consider factual allegations within the complaint as sworn averments and that the court did not give the prisoner sufficient notice under Rule 56(e) of the pending motion for summary judgment as mandated by *Rosebory* v. *Garrison*, 528 F.2d 309 (4th Cir. 1975). In the process of so holding, the Fourth Circuit noted that "[b]y alleging and swearing that warden Zahradnick had neglected his duty to supervise and control the prison guards, Davis proceeded upon a proper theory of § 1983 liability, and not upon the discredited *respondeat superior* doctrine." 600 F.2d at 459 n. 1. Read literally, the quoted language suggests that mere negligent behavior by a prison official acting in his supervisory capacity is sufficient to result in liability under Section 1983. This court chooses to disregard the literal language of the footnote for at least two reasons. First, the language flies in the face of established case law that mere negligent behavior does not result in Section 1983 culpability; an intentional deprivation or at least deliberate indifference is essential. *See Estelle v. Gamble*, 429 U.S. 97 (1976). Secondly, the court regards the statement as merely dicta; the statement is not essential to the court's ruling that the summary judgment was improper becasue of failure to give Rule 56(e) *Roseboro* notice. Moreover, the statement's importance is diminished by its relegation to footnote status. Further, the statement is unaccompanied by citation or detailed discussion.

The plaintiff has the burden of proof in establishing that prison supervisory officials knowingly acquesced in Officer Durham's alleged denial of Grissom's access to the courts. *Landman v. Royster*, 354 F.Supp. 1302, 1316-17 (E.D.Va. 1973). The mere conclusory allegation that others "should have

known" of Durham's actions does not meet that burden. Therefore, the court concludes that Grissom has not alleged sufficient facts to show liability on the part of any of the defendants for denial of his access to the law library.

Accordingly, defendants' motion for sumary judgment is granted and the action is dismissed.

SO ORDERED.

F.T. DUPREE, JR.
UNITED STATES DISTRICT
JUDGE

February 11, 1980

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
UNPUBLISHED
No. 80-6118

James R. Grissom,

Appellant,

v.

Amos Reed, FLetcher K. Sanders,
E.L. Panepento, L.V. Stephenson,
George Boone,

Appellees.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. F.T. Dupree, Jr., District Judge.

Submitted: September 2, 1980 Decided: October 23, 1980

Before HAYNSWORTH, Chief Judge; WINTER and SPROUSE, Circuit Judges.

(James R. Grissom, Appellant Pro Se. Ben G. Irons, II, Assistant Attorney General, for the Appellees.)

PER CURIAM

James Grissom, a North Carolina inmate, appeals the district court's entry of summary judgment for defendants in this action. We agree with the lower court that summary judgment was appropriate as regards Grissom's claim of a denial of access to the courts. That part of the judgment is affirmed on the basis of the district court's sound reasoning.

We do not believe, however, that summary judgment

appropriately was entered on Grissom's claim regarding his health grade status. Although the determination of health grade status and work assignments is discretionary with prison officials, *Altizer v. Paderick*, 569 F.2d 812 (4th Cir. 1978), the State of North Carolina has dictated that certain procedures must be followed in making those determinations. Grissom alleges that prison officials arbitrarily failed to heed their own guidelines, and that this failure resulted in serious injury to his health. If these allegations are true, Grissom has stated a cognizable claim, for when a state official's violation of state law causes the imposition of cruel and unusual punishment, a federal cause of action arises under § 1983. *Miller* v. *Carson, 563 F.2d 757, 760 n.7(5th Cir. 1977). See McCourt v. Hampton*, 514 F.2d 1365, 1370 (4th Cir. 1975).

Grissom alleges that in 1979 defendant Panepento examined him and classified him as being A-grade health status, and thus eligible for all normal work assignments. Grissom claims that due to an arm and shoulder injury, he should have been classified as a B-grade health status, thereby limiting the nature of his work assignments. In fact, in 1972, Grissom was classified as B-grade due to the claimed shoulder and arm trouble; so far as the record indicates, he retained that status until Panepento made his own detrmination in 1979. Grissom further alleges that the changed health status resulted in his assignment to the prison cannery where he was forced to carry boxes of vegetables,[1] thereby causing him pain and aggravating his injury. He thus alleges a direct relationship between the medical classification and the pain and injury aggravation.

Under N.C.Gen.Stat. § 148-19(c), each prisoner admitted to the Department of Corrections must be examined by "a competent physician" before receiving a work assignment. Work assignments are to be made "with due regard for the report of the physician ... ." *Id.* Under the Department of

[1]We are cognizant of defendants' contrary description of Grissom's duties in the cannery. However, for purposes of this appeal, we must assume the veracity of Grissom's claim.

Corrections' regulations, the appropriate health grade is to be determined by "the examining physician." Panepento, however, is not a licensed physician. It would appear that he therefore is not legally qualified to conduct the examination and make the health grade determination called for by North Carolina Law.

Grissom alleges, in essence, that he suffered cruel and unusual punishment because the individual who examined him and determined his work fitness was not qualified to do so. He attributes his injuries to the allegedly willful failure of prison officials to have a physician perform the examination and determine his health grade.

A violaton of state law, without more, does not itself give rise to a constitutional claim. *See Martin v. Blackburn*, 581 F.2d 94 (5th Cir. 1978). However, when an arbitary violation of state law directly results in a deprivation of constitutional rights, a federal cause of action does arise. *Miller*, 563 F.2d at 760 n. 7.

We thus find the entry of summary judgment on this issue inappropriate. The determination of pertinent factual disputes regarding Grissom's work duties and actual physical condition can be made only in the district court. That court also is best qualified to determine whether any injury of constitutional magnitude resulted from a violation of state law. While we concur in the district court's characterization of the doctrine of *respondeat superior*, the complaint alleges that the named supervisory defendants personally violated Grissom's rights. They remain proper party defendants.

Because the materials before us reveal that oral argument would not significantly aid the decisional process, we dispense with oral argument. The judgment of the district court is affirmed in part and vacated and remanded in part for further proceedings not inconsistent with this opinion.

AFFIRMED IN PART,
VACATED AND REMANDED
IN PART.

EXPLANATORY NOTE

Defendant Panepento's application to the Board of Medical Examiners and the Board's letters approving that application which was offered to the Court of Appeals in his Petition for Rehearing appears in its entirety below.

BOARD OF MEDICAL EXAMINERS
OF THE
STATE OF NORTH CAROLINA
March 27, 1979
STATEMENT OF APPROVAL

Julian T. Sutton, M.D.
700 House Avenue
Scotland Neck, N.C. 27874

Dear Dr. Sutton:

Your application to use Edward Lee Panepento as an assistant has been aproved by the Board of Medical Examiners. It is acknowledged that you are responsible for the assistant's actions as approved by the Board.

It will be necessary for you to re-register this assistant on July 1, 1979.

Sincerely,

Bryant D. Paris, Jr.,
Executive Secretary
NORTH CAROLINA BOARD
OF MEDICAL EXAMINERS

BDPjr:kb

CC: Edward Lee Panepento, PA, N.C. Dept. of Corrections, Caledonia-Odom Complex P.O. Box 137, Tillery, N.C. 27887

BOARD OF MEDICAL EXAMINERS
OF THE
STATE OF NORTH CAROLINA

March 27, 1979

Julian T. Sutton, M.D.
700 House Avenue
Scotland Neck, N.C. 27874

Dear Dr. Sutton:

As requested in your recent application, your assistant to a physician Edward Lee Panepento has been assigned number 100096 by the Board of Medical Examiners. As required by law this number must be indicated on all oral and written prescriptions issued by your assistant.

With the assigning of this number your assistant to a physician is authorized to prescribe drugs under written standing orders only if such drugs are permitted by the attached formulary. The rules and regulations of the Board do not permit an assistant to a physician to presceibe any drug which is specified as a controlled substance under the Federal Controlled Substance Act.

If you wish for your assistant to be able to dispense medications, you should contact the North Carolina Board of Pharmacy, 109 Church Street, Post Office Box 471, Chapel Hill, North Carolina 27514, requesting the necessary information.

Sincerely,

Bryant D. Paris, Jr.,
Executive Secretary
NORTH CAROLINA BOARD
OF MEDICAL EXAMINERS

BDPjr:kb

cc: North Carolina Board of Pharmacy
Edward Lee Panepento, PA, Caledonia-Odom Prison Complex, P.O. Box 137, Tillery, N.C.

Enclosure

P.S. The number above was issued 8/14/76 in conjunction with approval to work with Ricard A. Mangum, M.C. This number has not been changed but is being returned indicating approval of 3/27/79 to work with Dr. Sutton as primary supervisor.

BY THE BOARD OF MEDICAL EXAMINERS OF THE STATE OF NORTH CAROLINA

Name of PA Edward Lee Panepento
Professional address: P.O. Box 137, Tillery, NC 27887
Residence address: Rt. 1; Box 70, Halifax, NC 27839
Birthplace: Batavia, New York Birthdate: 8-12-42
Education
High School Le Ray High Schol, 9-56 — 6-60 (Diploma) LeRoy, New York 1448
College U.S. Navy Hospital Corps - 1961-1965
PA Program Duke University Medical Center, 1966-1968, P.A. Certificate

Previous occupations (give name and address of employers, dates, and duties of employment)
Oct. 1968-Jan. 1976 as PA (Central Prison) N.C.Dept. of Corrections, 835 W. Morgan St., Raleigh, NC
June 1976-June 1977 - R.A. Mangum, MD P.A.-Family Practice, 102 W. Dogwood Creedmoor, NC as a P.A.
Enclose three character reference letters, not necessarily from a physician. Reference letters must be originals addressed to the North Carolina Board of Medical Examiners.

Have you ever been convicted of violating any criminal law? No. (if yes, attach explanation)
Have you ever used controlled substances other than those prescribed by a physician? No. (if yes, attach explanation)
Have you ever used alcohol to excess? No. (if yes, attach explanation)
Have you ever used alcohol to excess? No.

Have you read carefully and do you understand the rules and regulations for an assistant to a physician adopted by the North Carolina Board of Medical Examiners? Yes.
Have you read and do you understand the pharmacy laws and regulations which apply to assitance to physicians as promulgated by the North Carolina Board of Pharmacy? Yes.
I hereby certify that the foregong information is correct to the best of my knowledge and belief.

Date 3-15-79 Assistant Edward L. Panepento, PA

I. Physician practice information

A. Name of practice (John A. Doe, M.D.; ABC Clinic; Smith and Jones, M.D., P.A.; et al
1. J.T. Sutton - G.V. Byrum, MD, PA
2. N.C. Dept. of Corrections: Caledonia-Odom Complex

B. Address of practice (street, city, zip code)
1. 700 House Ave., Scotland Neck, NC 27874
2. P.O. Box 137, Tillery, NC 27887

C. Type of practice (family practice, surgery, etc.) Correctional Health Care

D. Do you have primary responsibility for the supervision of other physician's assistand and/or nurse practitioners? No.
If yes, please list names below.

E. Do other physician's assistants and/or nurse practitioners under the supervision other physicians work in this practice site? No.
If yes, please list names below.

F. Name and specialty of all physicians who will supervise the PA (if more than two provide information on separate sheet)

NAME #1 J.T. Sutton, MD
Office address: 700 House Ave., Scotland Neck, NC 27874
Telephone: (office) 826-3143 (home) 826-3143

Specialty: Surgery N.C. License # 8830
NAME #2 G.V. Byrum, MD
Office address: 700 House Ave., Scotland Neck, NC 27874
Specialty: Family Practice N.C. License # 9047

II. Utilization of PA

A. Specify sites at which the PA wil perform. (For each site, check below and the appropriate section relating to that site.)
6. Other (complete Form VIII)

SUPPLEMENTARY FORM VIII

This form is to be used to describe any site in which the PA wishes to function other than a physician's office, a hospital, an emergency department, or an extended care facility.

1. Location of facility (name and address) (Caledonia-Odom Complex)
   N.C. Dept. of Corrections, P.O. Box 137, Tillery, NC 27887
2. What is the relationship of the responsible physician to the facility (medical director, staff physician, etc.)? Staff Physicians
3. What is the source of salary for the PA for the time spent in this facility? Full time State Employee
4. What is the nature of the time assignment to the facility? 40 Hours Weekly and on call 24 hours daily while at residence.
5. Please list examples of functions which the PA will frequently carry out at this site. (For examples, please refer to examples previously cited.)
   See list of standing orders: to oversee the general health and medical rights of inmates assigned to these three prison units. (Caladonia, Odom and Halifax)
6. Indicate in detail the nature of the supervision which will be provided to the PA in this site. Bi-weekly clinic visits by supervising MDs and Central Prison Hospital Staff. 24 Hour accessability to Our Community Hospital Emergency Room, Scotland Neck, NC.

(This section of the application should be expanded appropriately to indicate in detail the nature of the facility, the nature of the patient population for whom the PA will provide care, the frequency of supervision of the PA by physicians, the plan for assessing the quality of the PA's performance, and other information which will give the Board a clear picture of this practice site and the relationship of the PA to it.)
The Caledonia-Odom Complex is three prison units. Caledonia is a satelite medical facility of Central Prison Hospital. Caledonia Medical Service serves approximately 750 inmates assigned to Caledonia, approximately 600 inmates assigned to Odom and approximately 500 inmates assigned to the Halifax Unit. Sick Call is held daily, emergencies are seen 24 hours daily. We are equipped with a 22 bed infirmary; to treat patients who do not medically qualify to be hospitalized at Central Prison Hospital.

The two physician supervisors maintain a private practice in Scotland Neck, NC and are employed by the N.C. Dept. of Corrections as part-time contractual employees. These two physicians will hold bi-weekly clinic and rounds in the infirmary, each Tuesday and Friday. One of hte two physicians will be on call 24 hours daily by telephone and will see emergency patients either at their office or in the infirmary , each Tuesday and Friday. One of the two physicians will be on call 24 hours daily by telephone and will see emergency patients either at their office or in the emergency room of Our Community Hospital in Scotland Neck, NC. On occasions inmates too ill to be transferred to Central Prison Hospital will be hospitalized in Our Community Hospital and cared for by their staff. The physicians assistant will be a permanent State Employee. He will organize Health Care Programs, and under the direction of Central Prison Health Services, and the two supervising physicians, provide treatment for the Caledonia-odom Complex. He will supervise the health care of inmates, general sanitation of the Complex and Health Care Personnel.

FORM IX — SUMMARY

Each of the undersigned has read this application and certifies that the information therein is correct to the best of his/her knowledge and belief. Each further cetifies that he/she has read carefully and understands the rules and regulations for an assistant to a physician adopted by the North Carolina Board of Medical Examiners. Such regulations will be fully complied with by the undersigned, and each undersigned physician accepts the responsibility of the applicant's conduct as an assistant to the physician.

DATE: _____ J.T. Sutton, MD

DATE: _____ G.V. Byrum, MD

DATE: _____ Supervising Physician

DATE: 3-15-79 Edward L. Panepento, P.A.

ENCLOSURES: (Check those enclosed)

Form I
Form II
Form VIII

STANDING ORDERS FOR, E.L. PANEPENTO, PA
By Drs. J.T. Sutton & G. V. Byrum:
For Caledonia Prison Unit

(1) To perform the necessary physicial exams and histories, routine and diagnostic.

(2) To hold sick call on regularly scheduled days and to treat medically, those problems responsive to the drugs approved in the PA Formulary.

(3) To provide treatment for wound care and debridement.

(4) To suture lacerations not involving major vessels, nerves or tendons.

(5) To change, apply and remove casts.

(6) Urinary catheterization.

(7) Nasal packings to control epistaxis.

(8) Treatment of boils (Incision & Drainage)

(9) To treat, by removal, foreign bodies in the eyes, (nonpenetrating) or under the skin.

(10) To treat ingrown toenails, corns, callouses and plantar warts by trimming or removal.

(11) To I & D thrombosed hemorrhoids.

(12) To provide intravenous penetration for I.V. Injection catheterization and fluids.

(13) Insertion of nasogastric tubes for lavage and gavage.

(14) To aspirate fluids from joints or inject appropriate medication into joint spaces.

(15) To refer medical, surgical and psychiatric patients to the appropriate physicians when further expertice of an M.D. is indicated.

(16) To order laboratory and x-ray diagnostic tests as indicated.

(17) To refer emergency medical, surgical or psychiatric patients to the nearest community hospital or Central Prison Hospital.

(18) To maintain quality medical records.

(19) To carry out or administratively supervise the execution of orders as given by the supervising physicians.

(20) To admit, treat and discharge patients by utilization of the prison infirmary. To supervise care in the infirmaries in the absence of the physician.

(21) To administratively supervise the isolation of contagious diseases and to assure the aseptic or sterile quality of supplies, as well as general sanitation of the prison unit.

(22) To review my work with my supervising physicians on a regular schedule.

(23) To follow the general guidelines as suggested by "Patient Care Guidelines for Family Nurse Practitioners", Axalla J. Hode, MD, Robert Greenburg, MD and C. Glenn Pickard, MD - Editors - Copyright 1976.

J.T. Sutton, MD

G.V. Byrum, MD

UNPUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 80-6118

James R. Grissom, Appellant,

v.

Amos Reed, Fletcher K. Sanders, E.L. Panepento, L.V. Stephenson, George Boone,

Appellees.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. F.T. Dupree, Jr., District Judge.

On Petition for Rehearing.

Submitted: November 18, 1980 Decided: April 21, 1981

Before HAYNSWORTH, Chief Judge; WINTER and SPROUSE, Circuit Judges.

(James R. Grissom, Appellant Pro Se. Ben G. Irons, II, Assistant Attorney General, for the Appellees.

PER CURIAM:

This case is before us on the appellee's petition for rehearing. We deny the petition.

The district court granted the defendant's motion for summary judgment. Grissom's allegations of a medically unsound work assignment and resultant serious harm,

however, could entitle him to relief if he can show the assignment was made arbitrarily, intentionally, or through deliberate indifference to his serious medical needs. Although a violation of state law, without more, does not itself give rise to a constitutional claim, under certain circumstances it can be evidence of deliberate indifference. An arbitrary violation of state law directly resulting in disregard of a prisoner's serious medical needs and in serious harm to the prisoner can provide the basis for an Eighth Amendment claim. *See Miller v. Carson*, 563 F.2d 757, 760-61 (5th Cir. 1977).

North Carolina law provides that each prisoner admitted to the Department of Corrections must be examined by "a competent physician" before receiving a work assignment. N.C. Gen. Stat. § 148-19(c). Grissom's examination was perfomred by a physician assistant.

It is true that N.C. Gen. Stat. § 90-18.1(d) allows physician assistants "to order medications, tests and treatments in hospitals, clinics, nursing homes and other health facilities" when certain conditions are met.

The privilege of a physician assistant to perform the procedures outlined in N.C. Gen. Stat. § 90-18.1(d) is conditioned upon the physician assistant's having current approval by the North Carolina Board of Medical Examiners and upon other conditions. ALthough the Board approved defendant Panepento's application to perform examinations such as that in issue, this administrative approval does not diminish or effect the affirmative direction of the North Carolina legislature in N.C. Gen. Stat. § 148-19(c) that prisoners be examined by licensed physicians. We do not believe the general language of N.C. Gen. Stat. § 90-18.1(d) can be read to countermand the specific mandate of N.C. Gen. Stat. § 148-19(c), which addresses the medical needs of prisoners directly.

Nor does the exemption from criminal sanctions contained in N.C. Gen. Stat. § 90-18(13) shed any light on the issue presented here. That section simply permits a physician assistant to perform the procedures outlined in N.C. Gen. Stat. § 90-18.1(d) without fear of prosecution for practicing medicine without a license.

Grissom is entitled to prove, if he can, that his injuries resulted from the deliberate indifference or arbitrary action of the defendants. It is, of course, for the district court to determine this in the first instance. Among other things it should consider whether the alleged injuries resulted from arbitrary disregard of the statutory requirement that a physician perform the examination, whether any injury actually resulted from an improper medical examination, whether the results of the examination were deliberately overlooked, whether an examination by a competent physician would have prevented the alleged injury, and whether the alleged harm was of a constitutional magnitude. Such determinations could not have been made on summary judgment based on the present record.

Accordingly, the petition for rehearing is denied.

PETITION FOR REHEARING DENIED.